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No. 07-547

IN THE

Supreme Court of the United States

OSCAR LOPEZ,

Petitioner,

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

The Commissioner did not gain a proper understanding of the rule of *Baker v. Bowen*, 839 F.2d 1075 (5th Cir. 1988), the basis on which the district court ruled and the Fifth Circuit affirmed below. As a consequence, the Brief in Opposition fails to accurately describe the holdings below and misanalyzes the nature and extent of the conflict among federal jurisdictions as to the proper interpretation of Section 2412(d)(2)(A). In particular, (i) it fails to acknowledge that the same fee application and government response that led the Fifth Circuit to declare $140 a proper inflation-adjusted rate in this case, if filed in the Third, Eighth or Ninth Circuits, would have resulted in an award not less than the $156.25 per hour requested, (ii) it fails to understand that the Fifth Circuit's holding below is squarely in conflict with those of the courts of appeal for the Third, Eighth, and Ninth Circuits, and (iii) it fails to identify the three respects in which the Fifth Circuit rule is simply unique among all federal jurisdictions, even when compared to the only other jurisdictions that adjust the rate cap using exclusively local inflation data.

Holdings of The Courts Below

The Fifth Circuit applies the rule of *Baker v. Bowen*, 839 F.2d 1075 (5th Cir. 1988), to all Social Security rate disputes that come before it. On the ostensible basis that awarding hourly-rates in Social Security cases that are not uniform within each judicial division creates "bewilderment among the bar and litigants," *Baker*, 839 F.2d at 1083, the Fifth Circuit interpreted Section 2412(d)(2)(A) as requiring that all lawyers be paid the same inflation-adjusted hourly

rate for Social Security cases filed in Dallas. The Fifth Circuit has applied the *Baker* rule repeatedly as to numerous other "locales." *See* note 5, *infra.*

Petitioner's fee application in this case was written for the specific purpose of challenging the rule of *Baker*. Mr. Lopez argued below that the national CPI-U, and not conditions in either Dallas or Abilene, should control the cost-of-living adjustment.[1] National CPI-U data attached to Petitioner's fee application was the only inflation evidence presented.[2] The Commissioner did not proffer inflation evidence, did not deny that the national CPI-U is the proper way to calculate "an increase in the cost of living," and did not otherwise oppose Petitioner's request that his lawyers be paid $156.25 per hour.[3] Despite this state of affairs, which the decisions below do not acknowledge, the district court discarded the national-CPI-U-based "cost of living" calculation set forth in Mr. Lopez's fee application, concluding that the court was required to follow the rule of *Baker*. He applied *Baker*'s locale-based rule *sua sponte*, using numerical reasoning that his orders do not disclose. The district court overruled all objections.[4] And, on appeal, the Fifth Circuit affirmed on the basis that the district court properly followed *Baker* and *Yoes*. App. A2. Given the surfeit of Fifth Circuit authority applying *Baker* to EAJA applications in Social Security cases, all of

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[1] Rec. at 169 n.6.

[2] Rec. at 191.

[3] Rec. at 218-223.

[4] App. C2-C3. The district court's order affirming the magistrate does not describe them properly. Compare App.C2 with Rec. at 260-261 and Rec. at 267-271.

which require uniformity within (but not beyond) the "locale" of the court in question,[5] the fact that the decisions below are unpublished is immaterial.

Ignoring *Baker*, Respondent suggests that the magistrate judge found the market rate for Petitioner's counsel to be less than the inflation-adjusted cap, and, therefore, never reached the question of how inflation should be handled. BOI at 5. This is incorrect. It reflects both a misunderstanding of the rule of *Baker* and an implausible interpretation of the magistrate's order. The magistrate's discussion of hourly rate (App. D3-D6) does not mention counsel's experience, ability, work, results achieved, or any of the factors that this Court has identified as determinative of a lawyer's market rate. *See Pierce,* 487 U.S. at 573. Nor did the magistrate consider the "quality of the services furnished" to Petitioner, which the EAJA deems essential to a proper determination of a lawyer's market rate. 28 U.S.C. § 2412(d)(2)(A). The quality of counsel's work in this case and, in particular, the "results achieved" for Mr. Lopez, was shown

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[5] *See Hall v. Shalala*, 50 F.3d 367, 370 (5th Cir. 1995) ("In *Baker*, we held that a determination of the appropriateness of increases based on the cost of living factor and the availability-of-attorneys factor must be uniform among the Dallas district courts. Likewise, these factors should be uniformly applied by the New Orleans district courts."); *Washington v. Barnhart*, 93 Fed.Appx. 630 (5th Cir. 2004) (remanding a fee award with instructions that the Houston court "be cognizant of the need for [hourly rate] uniformity in these types of cases."). *See also Yoes v. Barnhart*, 467 F.3d 426 (5th Cir. 2006) (affirming the Abilene court's previous uniform hourly rate of $132.50 as a proper application of the rule of *Baker*);

to be indisputably high.[6] But the district court did not consider this to be relevant. Nor could it have done so without running afoul of *Baker*, which requires that all lawyers – regardless of their particular qualifications, experience, ability, work, "results achieved" in the particular case, or place of residence – be paid precisely the same rate in every Social Security case filed in the relevant locale (Abilene). Social Security lawyers –ranging from new law-school graduates to the most experienced and accomplished veterans – are fungible under the rule of *Baker* and *must* be paid the same.

The portion of the magistrate's order that explains the hourly-rate finding cites *Baker* eight times. App. D4-D6. Stating that he was required to follow *Baker*, the magistrate judge reconfigured the statute's dual inquiries of market rate and cap adjustment[7] and con-

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[6] The "results achieved" for Mr. Lopez, "the most critical factor" in assessing the reasonableness of a fee, *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1982), was as follows: after receiving Plaintiff's brief but before the agency's brief was due, the Commissioner conceded not only the need for remand, but that Petitioner had been "disabled" since August 25, 1999. DEF.'S BRIEF IN SUPPORT OF UNOPPOSED MOTION FOR REVERSAL AND REMAND at 1. This entitled him to recover seven years of back benefits. Although remands for new hearings are not uncommon, it is truly rare for the agency to concede in federal court that the claimant is definitively "disabled" and has been so for years, notwithstanding numerous prior administrative determinations to the contrary.

[7] *See Meyer v. Sullivan*, 958 F.2d 1029, 1033-34 (11th Cir. 1992) (describing the two-step process for determining the proper hourly rate under the EAJA).

flated them into this single question: what hourly rate to be applied uniformly to all Social Security cases in Abilene will "minimize" costs to the taxpayer, without creating a shortage of lawyers willing to do that kind of work there. It chose $140 as this new "Goldilocks" rate: one not too high, not too low, but intended to perfectly equalize the supply of, and demand for, lawyers willing to handle Social Security appeals in Abilene.[8]

Circuit Split

Whether one focuses on the Fifth Circuit's decision in this case or on the rule of *Baker v. Bowen* that it applies and reaffirms, the existence of a circuit conflict on the question of how inflation adjustments should be calculated could hardly be clearer. It is particularly obvious from any of these three angles:

First, the same fee application and government response that led the Abilene court to award Petitioner

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[8] The rule of *Baker* requires every district court to proceed as though the relevant market for legal services is local, an assumption that has no basis in fact, as this case illustrates. Like many fields of law to which the EAJA applies, the Social Security appellate practice is highly portable. Since the claimant's administrative lawyer usually retains appellate counsel, one rarely travels to meet the client in person. Court appearances are also rare. So once the intricate body of Social Security law is mastered, the research and writing can be done from any office having an internet connection. The final work product can be dispatched for filing by email. So the best Social Security appellate practices tend to be regional or even national in scope. And it is the work of a moment to simply avoid lower paying venues such as Abilene.

$140 per hour in this case would have caused, in fact, it would have compelled, any district court in the Ninth Circuit to award at least $156.25 per hour. All relevant EAJA decisions in the Ninth Circuit have used the national CPI-U to calculate increased cost of living. *See Jawad v. Barnhart*, 370 F.Supp.2d 1077, 1083 (S.D.Cal. 2005) ("... the Ninth Circuit court of appeals and district court cases that apply single source for both CPI-U variables in the formula [for cost-of-living increases set forth in *Sorenson*,[9] all apply the *national* index.") (emphasis in original). Moreover, in at least two such cases from the Ninth Circuit, district courts have entertained specific requests that the local CPI be used. In both instances, these requests were denied on the basis that to use the local CPI would be contrary to Section 2412(d)(2)(A), as the Ninth Circuit had interpreted it. *See Jawad, id.*, and *Stewart v. Sullivan*, 810 F.Supp. 1102, 1107 (D.Haw. 1993) (refusing plaintiff's request that "the Department of Labor's Consumer Price Index (CPI) for Honolulu" be used in calculating the inflation adjustment, because "[i]n all the cases the court has reviewed ... including the cases cited by plaintiff, courts use the national CPI-U, which reflects the cost of living increase for all urban consumers. ... [I]f Congress had wanted to allow for cost of living adjustments in a particular region or city, it could have done so in the statute.")

Second, the court below held that the inflation proof before it, based upon changes in the national CPI-U, was not proper proof of "an increase in the cost of living" under Section 2412(d)(2)(A), even

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[9] *Sorenson v. Mink*, 239 F.3d 1140 (9th Cir.2001).

though the government did not object to it, did not oppose the hourly rate requested, did not propose an alternative inflation-adjustment methodology, and did not proffer inflation evidence of its own. The Fifth Circuit affirmed, holding that the district court did not abuse its discretion in so holding. The Fifth Circuit opinion in this case is directly contrary to cases from at least three other circuits – the Third, Eighth, and Ninth – all of which have held that the national CPI-U is at least "proper proof" of "an increase in the cost of living," if it is not the preferred or only proper proof. In particular, the decision below is directly contrary to *Johnson v. Sullivan*, 919 F.2d 503 (8th Cir. 1990), a case with almost identical facts, but an almost directly opposite holding. *Johnson*, 919 F.2d at 504 (Because the national Consumer Price Index constitutes "proper proof" of an increase in the cost of living, where "[t]he Secretary presented no evidence to suggest that the requested hourly rate was unreasonable, unjustified, or otherwise improper," the district court abused its discretion in failing to grant the requested inflation adjustment). *Johnson* is the case that the Fifth Circuit considered by name and expressly declined to follow in *Yoes*.

The Third Circuit has also "expressly approved the use of the Consumer Price Index in determining cost of living adjustment under the Equal Access to Justice Act." *Allen v. Bowen*, 821 F.2d 963, 967 (3d Cir.1987) (internal citation omitted). And the Ninth Circuit has not only approved the national CPI-U as a proper way to measure an increase in the cost of living under Section 2412(d)(2)(A), but has prescribed use of the national CPI-U as the preferred (and possibly the only proper) proof of inflation in EAJA ap-

plications. *See, e.g., Thangaraja v. Gonzales*, 428 F.3d 870 (9th Cir. 2005) (prescribing a mathematical formula based on the national CPI-U for making cost-of-living adjustments under the EAJA).

Finally, the *Baker* rule for determining hourly rate, which the Fifth Circuit has reaffirmed on at least four prior occasions in the context of requiring rate uniformity in Houston, Dallas, New Orleans, and Abilene,[10] is *unique* among federal jurisdictions in at least these three respects: (i) its insistence that "quality of the [legal] services furnished" to the claimant be disregarded in determining hourly rate, (ii) its insistence that all lawyers handling Social Security cases in a particular locale be paid the same rate there, (iii) its insistence that the "locale" *in which the district court sits* – as opposed to the locale in which the applying attorney principally lives and works – is controlling for both hourly rate and "cost of living" purposes. In the latter respect, the Fifth Circuit is in conflict even with the Veterans Court and the Court of Federal Claims, the only other locale-oriented jurisdictions, which hold that "the actual CPI increase *where the attorney works*" is the relevant issue. *Mannino v. West*, 12 Vet.App. 242, 243 (1999); *see also Cox Const. Co. v. U.S.*, 17 Cl.Ct. 29, 37 (1989).

Language of 2412(d)(2)(A) and *Pierce v. Underwood*

Without mentioning *Pierce v. Underwood*, 487 U.S. 552 (1988), which interprets the provision at issue in this case, the Brief in Opposition argues that "an increase in the cost of living," 28 U.S.C. § 2412(d)(2)(A),

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[10] In addition to this case, *see Baker, Hall, Washington*, and *Yoes*, described *supra* at note 5.

has no plain meaning, but reflects Congress's intention to allow district courts to choose freely among national, regional, or local inflation indexes. But this ignores that the statute says "*the* cost of living." And the inflation-adjustment clause modifies one national rate cap that applies uniformly in every legal market in the land. As one legal scholar has observed:

> The purpose of the rate cap is plainly one of protection of the public fisc. As the Supreme Court observed in *Pierce v. Underwood*, "Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." Although the cost of living may vary from region to region or city to city, the impact upon the federal treasury of an increase in allowable fee awards against the federal government is the same, whether the federal dollar is paid out to an attorney in New York or in Kansas City. The statutory rate cap is best conceived of as a uniform ceiling upon fee award outlays, so that the impact upon the public fisc remains the same from year to year in constant dollars.[11]

"When Congress created the EAJA in 1980, reenacted it in 1985 and most recently amended it in 1996, Congress had every opportunity to expressly include local or regional language for determining the cost of living adjustment. The fact that Congress did not insert any such language is telling here." *Jawad*, 370

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[11] Prof. Gregory Sisk, "The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)," 56 LA.L.REV. 1, 139-140 (internal citations and notes omitted).

F.Supp.2d at 1085-86 *citing Stewart*, 810 F.Supp. at 1107).

It is not inconceivable that, upon proper findings, exceptional circumstances might warrant departing from using the national CPI-U in a highly unusual case. But that is not this case, which neither of the courts below found to be exceptional. Moreover, the possibility of an exception to the national-CPI-U rule could easily be acknowledged in a decision on the merits and is no reason to deny certiorari.

CONCLUSION

District courts confront requests for inflation adjustments in virtually all EAJA application filed, which surely number in the tens of thousands each year. These should not be difficult to compute or controversial. In *Pierce v. Underwood* this Court said a great deal about what Section 2412(d)(2)(A) means. Although *Pierce* all but blocks the "special factor" path around the rate cap, it seems to invite the case that Mr. Lopez has now brought, which presents the question of what Section 2412(d)(2)(A)'s other exception to the cap means and how it should be proven. A clear answer is needed if the EAJA is to continue to serve its important national purpose.

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